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No. 81-2150

IN THE

Supreme Court of the United States

October Term, 1981

JIM MCNEFF, INC., a California corporation,

Petitioner,

vs.

FRANK L. TODD, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF PETITIONER ON THE MERITS.

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Questions Presented.

1. Is a prehire agreement authorized by Section 8(f) of the National Labor Relations Act, 29 U.S.C. § 158(f), enforceable in a suit brought under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, absent a showing that the union signatory to the agreement is the majority representative of the employer's employees?
2. Is a prehire agreement authorized by Section 8(f) of the National Labor Relations Act enforceable if it was entered into by an employer because of coercion by a union?

List of Parties to Proceeding Below.

Pursuant to Rule 34.1(b) of the Rules of the Supreme Court of the United States, a list of the parties in the proceeding below is submitted:

Frank L. Todd, Ray E. Ehly, Freeman M. Roberts, William Schmidt, William C. Waggoner, John C. Maxwell, Dale I. Vawter, Jerald B. Laird, William Cobb, Jr., C.W. Poss, Verne W. Dahnke, Alexander Rados, William A. Floyd and Jerry Toll, each in his respective capacity as Trustee of the Operating Engineers Health & Welfare Fund; Frank L. Todd, Ray E. Ehly, Freeman M. Roberts, John C. Maxwell, William C. Waggoner, Dale I. Vawter, C.V. Holder, William A. Cobb, Jr., Alexander Rados, William A. Floyd, Edwin Kalish, Steve Billy, Winton Kemmis and Dean Sweeney, Jr., each in his respective capacity as Trustee of the Operating Engineers Pension Trust; Frank L. Todd, Ray E. Ehly, Freeman M. Roberts, Jerry Toll, William C. Waggoner, C.I.T. Johnson, Dale I. Vawter, Don McCoy, William A. Cobb, Jr., Alexander Rados, William A. Floyd and Dean Sweeney, Jr., each in his

respective capacity as Trustee of the Operating Engineers Vacation-Holiday Savings Trust; Frank L. Todd, Ray E. Ehly, Freeman M. Roberts, William Schmidt, William C. Waggoner, Robert Lytle, Dale I. Vawter, Kenneth J. Bourguignon, Verne W. Dahnke, Winton Kemmis, William A. Floyd and Don MacIntosh, each in his respective capacity as Trustee of the Operating Engineers Training Trust,

Appellees below,

Jim McNeff, Inc.,

Appellant below.

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No. 81-2150

IN THE

Supreme Court of the United States

October Term, 1981

JIM MCNEFF, INC., a California corporation,

Petitioner,

vs.

FRANK L. TODD, *et al.*,

Respondents.

BRIEF OF PETITIONER ON THE MERITS.

Petitioner, Jim McNeff, Inc., a California corporation, respectfully requests that the judgment of the U.S. Court of Appeals for the Ninth Circuit which was entered in this proceeding on February 8, 1982,[1] be reversed and remanded.

OPINIONS AND ORDERS BELOW.

The Judgment and Opinion of the U.S. Court of Appeals for the Ninth Circuit, which was entered in this matter on February 8, 1982, is styled, *Frank L. Todd, et al. v. Jim McNeff, Inc., a California corporation*, and is reported at

[1]The within matter was numbered Case No. 80-5214 in the Court of Appeals. It is reported at 667 F.2d 800. Jim McNeff, Inc. was the Defendant-Appellant below, and Frank L. Todd, *et al.* were the Plaintiffs-Appellees below.

667 F.2d 800. It appears as Appendix A to the Petition for Certiorari.

The U.S. District Court for the Central District of California entered its Order on February 11, 1980, which is not officially reported. The Order appears as Appendix B to the Petition for Certiorari.

The Findings of Fact and Conclusions of Law of the U.S. District Court for the Central District of California were made on the record in oral argument on February 4, 1980. The transcript appears as Appendix C to the Petition for Certiorari.

On July 10, 1979, the Regional Director of Region 21 of the National Labor Relations Board issued a dismissal letter refusing to issue complaint against Jim McNeff, Inc. based on a charge filed by the International Union of Operating Engineers, Local No. 12. The document appears as Appendix D to the Petition for Certiorari.

On November 8, 1979, the General Counsel of the Board, by letter, denied the appeal of the action of the Regional Director. The document appears as Appendix E to the Petition for Certiorari.

On November 17, 1980, the Board issued a Supplemental Decision and Certification of Results of Election which is not officially reported. The Decision appears as Appendix F to the Petition for Certiorari.

JURISDICTION OF THE SUPREME COURT.

The judgment and opinion of the U.S. Court of Appeals for the Ninth Circuit was entered on February 8, 1982. No petition for rehearing, or for further hearing before the full Court, has been filed. The Petition for Certiorari was filed on May 7, 1982.

The jurisdiction of the U.S. Supreme Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED.

United States Code, Title 29:

§ 185(a) "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

§ 158(a)(5) "It shall be an unfair labor practice for an employer —

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

§ 158(f) "It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by an action defined in section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants

for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e)."

STATEMENT OF THE CASE.

Statement of Facts.

Jim McNeff, Inc. ("McNeff, Inc.") is an employer engaged in business in the construction industry. In September of 1978, McNeff, Inc. was engaged in business as a subcontractor on a jobsite in Southern California. McNeff, Inc. employed three employees on the jobsite, none of whom were members of the International Union of Operating Engineers, Local No. 12 ("Union"). McNeff, Inc. was not signatory to any agreement with the Union. (Pet., Appendix A, p. 2)

On September 13, 1978, a representative of the Union approached Jim McNeff, President of McNeff, Inc., and informed him that McNeff, Inc. would have to sign the Master Labor Agreement ("Agreement") with the Union or leave the job. McNeff refused the ultimatum. (Pet., Appendix A, p. 2)

The Union representative left and returned with the general contractor who also informed McNeff that he would have to sign the Agreement if he wanted to continue on the site. McNeff then relented and signed the Agreement. He did not read the Agreement or intend to abide by its terms.

McNeff then had all three nonunion employees sign union cards the same day. (Pet., Appendix A, p. 2)

McNeff, Inc. never complied with the Agreement. From October, 1978 to March, 1979, the union trust funds sent reports to McNeff, Inc. for their completion and return. McNeff, Inc. returned the forms each month and wrote upon them that "no members of this craft were employed during this month." (Pet., Appendix A, p. 2)

One month after the first form was returned to the trust fund, the trustees requested an audit of McNeff, Inc.'s books. An audit was eventually conducted and the trustees claimed $5,316.79 to be due the trusts. (Pet., Appendix A, p. 2)

Proceedings Below.

On April 26, 1979, trustees filed a breach of contract suit against McNeff, Inc. pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, in the Federal District Court for the Central District of California.

On May 22, 1979, McNeff, Inc. filed a petition with the National Labor Relations Board ("Board") seeking a representation election among all of its employees performing operating engineer work as delineated in the Agreement.

On June 4, 1979, the Union filed a charge with the Board against McNeff, Inc. alleging that McNeff, Inc. had violated Section 8(a)(5) of the National Labor Relations Act ("Act"), 29 U.S.C. § 158(a)(5), by repudiating and failing to comply with the Agreement.

On July 10, 1979, the Regional Director of Region 21 of the Board, by letter, dismissed the Union's charge and refused to enforce the Agreement, noting that a full collective bargaining relationship had not been established. The Director refused to hold that the Union had perfected a full collective bargaining relationship on the basis of the union

membership of the three employees who were instructed to join the Union.

The Union appealed the action of the Regional Director to the General Counsel of the Board. On November 8, 1979, the General Counsel denied the appeal. The General Counsel noted that McNeff, Inc. was forced to sign the Section 8(f) agreement.

On January 23, 1980, an election among McNeff, Inc.'s operating engineer employees was conducted by the Board. The results were not conclusive at that time because of official challenges to certain ballots and the filing by the Union of objections to the conduct of the election.

The trustees filed a motion for summary judgment and McNeff, Inc. filed a cross-motion for summary judgment in the trustee action. On February 4, 1980, counsel for trustees and McNeff, Inc. were heard on their motions in open court.

On February 11, 1980, the district court entered its Order granting the trustees' motion for summary judgment and denying defendant's motion for summary judgment. In the Summary Judgment Order the district court found that the trustees had shown entitlement to the judgment as a matter of law.

McNeff, Inc. appealed the decision to the Court of Appeals for the Ninth Circuit. On October 8, 1981, oral argument was held before the court in Los Angeles, California.

On November 17, 1980, the Board issued its Supplemental Decision and Certification of Results of Election, certifying that a majority of McNeff, Inc.'s employees did not vote for the Union and that the Union is not the bargaining representative of the employees.

On February 8, 1982, the court issued its judgment and opinion.

The Decision of the Court of Appeals Below.

The "major issue" of the case before the court was whether minority prehire agreements are enforceable in Section 301 litigation. The court reviewed the wide split of authority on this issue which has developed since this Court's decision in *N.L.R.B. v. Local Union No. 103, Iron Workers (Higdon Contracting Co.)*, 434 U.S. 335 (1978). The court reviewed the positions of the Eighth and Tenth Circuits, which have held minority prehire agreements to be enforceable in Section 301 litigation, and the contrary position of the Fifth Circuit which has held such agreements unenforceable until the union involved obtains majority status.

The court then opted for what it called the middle position. The court held that prehire agreements are enforceable despite a union's lack of majority status. However, the employer in such a circumstance can repudiate the agreement if the union has not achieved majority status. After such a repudiation the minority agreement is no longer enforceable. The court held that McNeff, Inc., as a matter of law, had not repudiated the Agreement and that the Agreement was therefore valid until the lawsuit was filed.[2] The court held that McNeff, Inc.'s noncompliance with the agreement did not constitute repudiation.

The court also rejected the position of McNeff, Inc. that this Court's decision in *Higdon* authorized only the voluntary acquisition of prehire agreements and that the agree-

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[2]The court apparently held that the filing of the suit constituted knowledge of the employer's repudiation as a matter of law and that liability was cut off at that point. In making this determination the court, *sub silentio*, found that the union had not obtained majority status because there could be no repudiation once majority status was achieved. The court did not otherwise address the issue of whether in fact the employees of McNeff, Inc. had designated the union as their majority representative.

ment was therefore not enforceable. The court specifically did not pass on whether the Union's conduct amounted to coercion.[3] The court held that such a resolution was not necessary because the issue of coercion can only be raised at the time of repudiation.

The court only mentioned that unfair labor practice charges had been filed in the matter and that the General Counsel had declined to prosecute the case on the ground that a full collective bargaining relationship had not been established. The court did not mention the outstanding election that had been conducted by the Board among McNeff, Inc.'s employees.

SUMMARY OF ARGUMENT.

1. This Court in *NLRB v. Local Union No. 103, Iron Workers (Higdon Contracting Co.)*, 434 U.S. 335 (1978), in review of a Board decision, examined the interrelation of Section 8(f) of the Act with Sections 8(a)(5) (involving refusal to bargain) and 8(b)(7)(C) (involving recognitional picketing). This Court held that an employer's duty to honor an 8(f) prehire agreement under Section 8(a)(5) is contingent on the union demonstrating its majority status. This Court also held that prehire agreements are likewise unenforceable in Section 301 litigation if the union fails to establish majority status.

2. Congress authorized prehire agreements as preliminary steps which do not become binding collective bargaining agreements until the union achieves majority status. This is based on the statutory policy protecting employee rights to designate their own representative for purposes of collective bargaining. Congress authorized the execution of

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[3]Petitioner does not request that this Court decide this issue. For purposes of argument, it will be assumed the Union's conduct amounted to coercion.

prehire agreements in order to allow employers (1) to have access to union-referred workmen for a quick supply of labor; and (2) to know the cost of labor in order to bid for projects. This Court held such agreements may be voluntarily honored. However, the court below is enforcing the terms of these agreements despite employee wishes, in circumstances where Congressional purpose has not been realized — where employers obtain their own workmen and make their bids based on noncontractual wage rates.

3. This Court has recognized that Section 8(f) is an exception to the rule that Congress intended to limit "top-down" organizing in its 1959 amendments to the Act. But this Court noted that Congress specifically limited the exception. Three times this Court has reviewed Section 8(f) and each time it has condemned "top-down" organizing and has limited the section's application.

4. This Court and the Board have held that prehire agreements may only be executed voluntarily and no element of coercion should be allowed. The court below, by refusing to entertain an affirmative defense concerning the voluntary execution of the agreement, is permitting unions to obtain prehire agreements by means condemned by Congress.

5. The Board does not enforce prehire agreements until the union demonstrates majority status and its policy has been upheld by this Court in *Higdon*. The enforcement of agreements by courts under Section 301 when they cannot be enforced in unfair labor practice proceedings is contrary to this Court's requirement that there be a uniform national labor policy.

6. The 1980 amendments to ERISA do not require the enforcement of minority agreements. The amendments do not refer to prehire agreements or to Section 8(f) of the Act.

This Court has rejected a similar argument that the amendments negate an affirmative defense challenging the legality of an agreement. The issue of the underlying enforceability of the agreement is obviously a crucial issue to be determined by a court.

ARGUMENT.

THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *N.L.R.B v. LOCAL UNION NO. 103, IRON WORKERS (HIGDON CONTRACTING CO.)*, 434 U.S. 335 (1978).

A. Issues Presented to This Court in *N.L.R.B. v. Local Union No. 103, Iron Workers (Higdon Contracting Co.)*, 434 U.S. 335 (1978).

This Court, in *N.L.R.B. v. Local Union No. 103, Iron Workers (Higdon Contracting Co.)*, 434 U.S. 335 (1978), reversed the decision of the Court of Appeals for the District of Columbia Circuit which had denied enforcement of a Board order. This Court adopted the Board's interpretation of Section 8(f) of the Act, to the facts of the case.

Courts have disagreed as to the applicability of the *Higdon* decision to suits brought pursuant to Section 301 to enforce the terms of prehire agreements.[4] To evaluate this issue it is necessary to retrace the steps which led to this Court's resolution of what constituted a continuing conflict between the Board and the Court of Appeals for the District of Columbia Circuit.

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[4]The Fifth and Eleventh Circuits have found prehire agreements to be unenforceable unless the union establishes that it had achieved majority status. *Baton Rouge Bldg. & Const. v. E.C. Schafer Constr.*, 657 F.2d 806 (5th Cir. 1981); *District Council v. McDowell Contractors*, 110 LRRM 2965 (11th Cir. 1982). The court below and the District of Columbia Circuit have held minority prehire agreements to be enforceable until the employer notifies the union that it is repudiating the agreement. *Welfare Fund v. Overhead Door Co.*, 681 F.2d 1 (D.C. Cir. 1982). The Eighth and Tenth Circuits have held them to be enforceable at all times. *Contractors, etc. v. Associated Wrecking Co.*, 638 F.2d 1128 (8th Cir. 1981); *New Mexico District Council, etc. v. Mayhew Co.*, 664 F.2d 215 (10th Cir. 1981). The Eighth Circuit has apparently modified its broad rule in *W.C. James, Inc. v. Oil, Chemical & Atomic Workers Int'l Union*, 646 F.2d 1292 (1981).

The conflict began in the Board's landmark decisions of *R.J. Smith Construction Co.*, 191 NLRB 693 (1971) and *Ruttmann Construction*, 191 NLRB 701 (1971).

Section 8(f) was added to the statute in the 1959 amendments to the Act. The *R.J. Smith* and *Ruttmann* decisions marked the Board's first in-depth analysis of Section 8(f) and its interrelation to Section 8(a)(5). This Court extensively commented on, and relied upon, these companion Board cases in its *Higdon* decision.

R.J. Smith.

The construction employer in *R.J. Smith* executed a minority prehire agreement but did not implement the terms of the agreement. The employer occasionally raised the rates of many of its employees without prior notice to the union. These rate increases did not bring the wage rates of the employees up to the rates set forth in the prehire agreement.

When the union discovered the employer's noncompliance, it filed a charge with the Board and the Board's General Counsel issued a complaint alleging that the employer had unilaterally changed contractual wage rates in violation of Section 8(a)(5) of the Act. At issue before the Board was the employer's conduct dating back six months (the Board's statute of limitations) before the original charge had been filed. *Id.* at 693 and 696.

"Unilateral change" is a term of art used by the Board which refers to an employer's changes in the employees' working conditions without prior notice to or bargaining with the employees' bargaining representative. This Court, in *Labor Board v. Katz*, 369 U.S. 736 (1962), agreed with the Board that an employer which granted "unilateral" wage increases "without having advised or consulted with

the union"[5] violated Section 8(a)(5) of the Act regardless of the employer's otherwise good faith in its bargaining relationship with the union.

The failure to comply with a contractual wage scale also constitutes unilateral action even if no actual "change" in the employer's operation occurs. In *R.J. Smith* the General Counsel and the union contended that the employer "unilaterally changed working conditions by failing . . . to put the contracts' requirements into effect . . ." *R.J. Smith*, 191 NLRB at 697. As a remedy, the government sought past as well as present compliance with the terms of the prehire agreement. *Id.* at 696.

The Administrative Law Judge before the Board found that the employer failed to adhere to the terms of the agreement and that its intentional noncompliance had been concealed from the union.[6] The Judge also found that the employer's various wage changes were implemented "without prior notice to, or bargaining with" the union. *Id.* at 697.

Despite these factual findings, the Judge held that the employer's unilateral conduct did not violate Section 8(a)(5) of the Act because the union did not represent a majority of the employees.

The Board, on review, agreed with the Judge. The Board analyzed the legislative history to Section 8(f) and the section's interrelation with Section 8(a)(5) of the Act. The Report of the House of Representatives Committee on Education and Labor, as quoted by the Board, was submitted to be the Congressional intent for enacting Section 8(f):

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[5] *Katz*, 369 U.S. at 745.

[6] "In short, without disclosing his design to the other contracting party, Smith sought to obtain benefits from the agreement without undertaking its obligations." *R.J. Smith*, 191 NLRB at 697 n. 6. *See also R.J. Smith*, at 697, n. 7.

> In the building and construction industry it is customary for employers to enter into collective-bargaining agreements for periods of time running into the future, perhaps 1 year or in many instances as much as 3 years. Since the vast majority of building projects are of relatively short duration, such labor agreements sometimes apply to jobs which have not been started. *The practice of signing such agreements for future employment is not entirely consistent with Wagner Act rulings of the NLRB that exclusive bargaining contracts can lawfully be concluded only if the union makes its agreement after a representative number of employees have been hired.* One reason for this practice is that it is necessary for the employer to know his labor costs before making the estimate upon which his bid will be based. A second reason is that the employer must be able to have available a supply of skilled craftsmen ready for quick referral. The committee has determined that the object of validating the prehire agreement in the building and construction industry is sound and has chosen to accomplish this object by providing that a prehire agreement in that industry shall not constitute an unfair labor practice under the act. [Emphasis added by Board.][7]

The Board held that this legislative history reveals that Section 8(f) was enacted to "immunize employers in the construction industry from the strictures of Section 8(a) of the Act" when they enter into minority prehire agreements.[8] However, the Board held that the language of Section 8(f)

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[7] *R.J. Smith*, 191 NLRB at 694, citing H.R. Rep. No. 741, 86th Cong., 1st Sess., 1 Leg. Hist. 759, 777 (1959).

[8] It is important to note the portion of the legislative history emphasized by the Board in making its determination that Section 8(f) only immunizes the preliminary steps of a prehire agreement. This portion of the legislative history is usually omitted by courts which recite legislative history to support the proposition that prehire agreements are enforceable.

"clearly suggests the limits of its effect", noting especially the final proviso to the section:

> Provided further, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e).

In other industries the existence of a labor agreement bars the conducting of a representation election under the Board's "contract bar" rule because the agreement grants the union an "irrebuttable presumption" of majority status. No such presumption is afforded construction unions under prehire agreements and therefore minority prehire agreements cannot be a bar to an election. *R.J. Smith*, 191 NLRB at 695.

The Board concluded that the election proviso revealed Congressional intent to "immunize from liability only the preliminary contractual steps" of entering into prehire agreements. The Board emphasized that the proviso permits the testing of the union's majority status "at any time" in an election petition. Because majority status may be challenged at any time by the filing of an election petition, the Board reasoned that "it would be anomalous, indeed, to hold that Section 8(f) prohibits examination of those questions in the litigation of refusal-to-bargain charges." *Id.* at 694.

Applying this analysis, the Board dismissed the 8(a)(5) refusal to bargain charges and held, as correctly noted by the Board's dissenting members, that a minority prehire agreement "is effective only so long as both parties wish to adhere to it and may be ignored with impunity, as it was in the instant case, by either party at any time . . ." *Id.* at 695.

***Ruttmann* Case.**

In the companion case of *Ruttmann Construction*, 191 NLRB 701, the employer entered into a prehire agreement and complied with its terms on various construction projects. However, the employer then entered into another prehire agreement with a rival union for work on a selected jobsite. *Ruttmann*, 191 NLRB at 705.

Once again, this action was concealed from the first union. Two months after work began on the disputed project a business representative from the first union approached the employer and asked why the union had not been notified that the employer was working on the project. *Id.* at 706.

Nevertheless, the Board held this unilateral action to be privileged because the union did not establish its majority status at the disputed project. The Board held that entering into a prehire agreement "is merely a preliminary step that contemplates further action for the development of a full bargaining relationship." *Id.* at 702.

Court Review of *R.J. Smith*.

The Board's decision in *R.J. Smith* was set aside and remanded by the Court of Appeals for the District of Columbia Circuit. *Engineers Local 150 v. N.L.R.B.*, 480 F.2d 1186 (1973). The court noted that the employer acted without notice to the union and held such unilateral conduct to be violative of Section 8(a)(5) of the Act even though the union did not represent a majority of the employees.

The court held that the election proviso to Section 8(f) provided machinery for an employer to test the union's majority. If the employer chose to seek an election, and if the results proved that the union had minority status, then

the employer would not be required to honor the 8(f) agreement. Until then, the court held that the 8(f) agreement was enforceable.[9]

Board Decision in *Higdon*.

The Board continued to adhere to its interpretation of Section 8(f) of the Act. This set the stage for the next confrontation with the District of Columbia Circuit which occurred in *Higdon. Local Union No. 103 (Higdon Contracting Co.)*, 216 NLRB 45 (1975).

Unlike *R.J. Smith* and *Ruttmann, Higdon* involved a charge against a union alleging a violation of Section 8(b)(7)(C) of the Act which prohibits recognitional picketing exceeding thirty days if an election petition has not been filed with the Board. The Board recognizes an exception to the literal terms of Section 8(b)(7)(C) and permits continuous recognitional picketing if such does not seek *initial* recognition. Thus a union can picket for an unlimited duration for a renewal of a prior agreement or to enforce a current agreement. The existence of a valid collective bargaining agreement therefore constitutes a defense to an 8(b)(7)(C) charge. At issue in *Higdon* was whether such a defense was valid where a minority union's picketing was conducted to enforce current compliance with a Section 8(f) agreement.

The employer in *Higdon* was actually two entities. Higdon Construction Company signed a prehire agreement with the union. Thereafter Higdon Contracting Company was formed for the sole purpose of performing nonunion work.

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[9]On remand the Board accepted the court's decision as the law of the case, noting that it chose not to seek a petition for certiorari to review the court's decision. The Board did serve notice that it intended to apply the law of its original decision in future cases. *R.J. Smith*, 208 NLRB 615.

Shortly after the second entity began working on a "nonunion" jobsite, the union discovered the arrangement and confronted the owner of both companies. The owner admitted that both companies were "one and the same" and that he formed the second company to perform nonunion work. The union then began picketing at the nonunion jobsite to enforce its prehire agreement.

The Administrative Law Judge before the Board found the two companies to be alter egos and the prehire agreement therefore to be applicable to both entities. The Judge then sought to distinguish the application of *R.J. Smith*. The Judge noted that the employer in *R.J. Smith* never implemented the prehire agreement. The employer in *Higdon* did implement the agreement and there was no evidence that it "actually repudiated" the agreement. Rather, the employer sought to adhere to the agreement on union projects but to avoid it on nonunion projects. The Judge held that this "blow hot, blow cold"[10] adherence to the agreement did not render the union's conduct "vulnerable" to Section 8(b)(7)(C). The Judge considered the lack of a total repudiation of the agreement to be significant:

> Since there is no persuasive evidence that the Employer, who had recognized the Union, intended to terminate the contract *in toto* but only sought by subterfuge and chicanery to avoid its application for nonunion work while adhering to the contract for union work, the picket legend published the truth.
> *Higdon*, 216 NLRB at 50.

The Judge concluded that the employer had recognized the union and, therefore, the picketing was not for initial recognition.

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[10] *Higdon*, 216 NLRB at 49.

On review, the Board accepted the Judge's finding that the two entities were alter egos. The Board then specifically noted the Judge's distinction of *R.J. Smith* on the ground that the contract was not "actively repudiated" but was indeed followed on "union" projects. The Board rejected the distinction.

The Board reviewed and reaffirmed its decisions in *R.J. Smith, Ruttmann* and *David F. Irvin, et al., d/ba The Irvin-McKelvy Company*, 194 NLRB 52 (1971). The Board emphasized, citing *Irvin-McKelvy*, that even if a union establishes its majority status on individual projects, no presumption of majority status flows to other projects. *Higdon*, 216 NLRB at 46.

The Board then reasoned that because the employer was free, under Section 8(a)(5), to "ignore" the agreement "with respect to nonunion jobs," the union's excessive picketing to enforce its "noneffective 8(f) contract" was for initial recognition and therefore proscribed by Section 8(b)(7)(C). *Higdon*, 216 NLRB at 46.

District of Columbia Circuit Revisited.

The union sought review of the Board's order in the Court of Appeals for the District of Columbia Circuit. Citing its earlier rejection of the Board's *R.J. Smith* decision the court refused to enforce the Board's order. The court chided the Board for its interpretation of Section 8(f) and held that it was the employer, not the union, that had violated the Act. Once again, the court adhered to its opinion that minority agreements are enforceable until the employer successfully utilizes the machinery set forth in the election proviso. *Local 103, Iron Workers v. N.L.R.B.*, 535 F.2d 87 (1976).

The Board's Petition to This Court.

The Board petitioned this Court for a writ of certiorari. The Board made it clear that it did not seek to limit the scope of this Court's review to an interpretation of Section

8(b)(7)(C) picketing. Rather, the Board sought a broad review of the Board's interpretation of Section 8(f). The Board, in its petition, reviewed its *R.J. Smith* and *Ruttmann* decisions and their application in *Higdon*. The Board specifically noted the District of Columbia Circuit's earlier rejection of the Board's position and sought the petition to resolve this continuing conflict.[11]

This Court granted the Board's petition.

Argument Presented to This Court.

The Board vigorously attacked the rationale of the District of Columbia Circuit that minority agreements are enforceable until the employer successfully utilizes the provisions of the election proviso to prove the union's lack of majority status. The Board adamantly opposed any notion that the employer had any obligation to trigger the unenforceability of minority agreements. The Board stressed the paramount right of employees to be free to choose their own representative requires that the *union* must establish and prove majority status:[12]

> The significant difference between the court's position and the Board's, relates to *when* the agreement becomes unenforceable and who has the burden of triggering the determining event. The Board's position, unlike the court's, is consistent with the basic principles of the Act, which impose an affirmative obligation on unions to achieve and demonstrate majority support.[13]

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[11]The Board reasoned that Section 10(f) of the Act permits any aggrieved party before the Board to seek review in the District of Columbia Circuit no matter where the conduct occurred. Therefore, if the Board was to continue to apply the interpretation of Section 8(f) it deemed proper, it was necessary to have this Court resolve the continuing conflict. Petition for Certiorari, pp. 9-10, 19-20, *Higdon*, 434 U.S. 335 (1978).

[12]Brief for Petitioner, pp. 12, 29-32, *Higdon*, 434 U.S. 335 (1978).

[13]Brief for Petitioner, p. 31, *Higdon*, 434 U.S. 335 (1978).

The union, in addition to arguing that Congress intended to permit enforcement of agreements if it intended to permit their existence, also argued that a contrary finding by this Court would be inconsistent with this Court's earlier decision in *Retail Clerks International Association v. Lion Dry Goods, Inc.*, 369 U.S. 17 (1962), which allegedly stood for the proposition that federal courts could entertain suits under Section 301 based on agreements authorized by Section 8(f).

The Board, in its reply brief, argued that the *Lion Dry Goods* decision dealt only with the *jurisdiction* of courts to entertain suits under Section 301 and did not address the validity or enforceability of particular agreements. The Board agreed that courts under Section 301, just as the Board under Section 8(a)(5), could enforce 8(f) agreements "if the union in fact represents a majority of the employees."[14] But, the Board argued:

> *Lion Dry Goods* does not suggest that Section 301(a) renders enforceable contracts the enforcement of which would otherwise contravene the policies of the National Labor Relations Act, which is the very issue presented in this case.[15]

The Board strenuously argued that federal courts may only enforce agreements under Section 301(a) "so long as they are otherwise consistent with the policies of the Act." The Board noted that this Court and other courts have made this clear by not enforcing contracts where enforcement would conflict with Board decisions under the Act.[16]

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[14]Reply Brief for Petitioner, p. 2, *Higdon*, 434 U.S. 335 (1978).
[15]Reply Brief for Petitioner, p. 3, *Higdon*, 434 U.S. 335 (1978).
[16]Reply Brief for Petitioner, p. 3, n. 2, *Higdon*, 434 U.S. 335 (1978).

B. This Court in *Higdon* Held That Minority Prehire Agreements Are Unenforceable.

In *Higdon* this Court briefly reviewed the Board's continued conflict with the District of Columbia Circuit and established the issue to be the validity of the Board's interpretation of Section 8(f) and its interplay with "other sections of the Act, primarily §§ 8(a)(5) and 8(b)(7)(C)." *Higdon*, 434 U.S. at 341.[17] After an extensive analysis of legislative history, this Court held that prehire agreements are unenforceable until the union obtains the majority support of the employees. Despite this ruling, courts have struggled with the question of the enforceability of minority prehire agreements in Section 301 litigation.

The courts which have adopted the position of this Court that minority prehire agreements are unenforceable have focused their inquiry on *employee* rights and have recognized that enforcement of minority prehire agreements is inconsistent with these rights.

The courts which have enforced the terms of minority prehire agreements have resisted a rule of law which they believe conflicts with the basic principle of common law that parties should be bound to their contractual agreements. This notion is based on a false premise and assumes the ultimate fact.

These courts view collective bargaining agreements as contracts between unions and employers. They are not. Collective bargaining agreements are contracts between an

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[17]The Eighth and Tenth Circuits held that this Court, in its *Higdon* decision, "did not purport to decide the enforceability of all Section 8(f) agreements but only those which implicated the provisions of Section 8(b)(7)(C)." *Contractors, etc. v. Associated Wrecking Co.*, 638 F.2d 1128 at 1133 (8th Cir. 1981); *New Mexico Dist. Council, etc. v. Mayhew Co.*, 664 F.2d 215 at 219 (10th Cir. 1982). This analysis is clearly in error.

employer and its employees, through the union as the *agent* — the collective bargaining agent — of the employees.[18]

This Court has held that a prehire agreement "attains the status of a collective-bargaining agreement" only when the union obtains majority support. *Higdon*, 434 U.S. at 350. Until then the union is an agent waiting for a principal. Until then the prehire agreement is a document waiting to be adopted by a majority of the employees.

C. This Court's Decision Was Based on an Analysis of Employee Rights and Legislative History.

The cornerstone of this Court's decision in *Higdon* was based on the wishes of the employees. This Court noted that the Board's position was rooted in the statutory policy that a union should not act as the collective bargaining agent for employees unless it is the voice of the majority of the employees. *Higdon*, 434 U.S. at 344. This Court then reiterated its prior holding in *Connell Construction Co. v. Plumbers Local 100*, 421 U.S. 616 (1975), that one of the major aims of the 1959 Act was to limit "top-down" organizing. This Court emphasized that such Congressional concern "did not evaporate as the focus turned to the construction industry" and admonished that the convenience afforded the construction industry to enter into prehire agreements was not meant to "be portrayed as an expression of

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[18]The rights of employees under the Act to select their own bargaining agent has been rightfully characterized by the Board as a fundamental right. It is a violation of the law for employers and unions in most industries to enter into an agreement if the union does not represent a majority of the employees. This is true even if both entities have a good faith belief that the union represents a majority of the employees. Prehire agreements in most industries are thus violative of the law. *Higdon, supra; Garment Workers v. N.L.R.B.*, 366 U.S. 731 (1961).

Section 8(f) was passed so that employers and unions would not violate the Act by entering into prehire agreements. But the Board and this Court have held the application of the section to be limited by the *fundamental* right of employees to select their own representative.

the employees' organizational wishes." As this Court observed, the proviso to Section 8(f) was added to ensure that an election could be demanded despite the existence of the prehire agreement. *Higdon*, 434 U.S. at 347-49.

Despite this Court's concern for the will of the employees, the court below has held that minority prehire agreements are enforceable until notice of repudiation.

This Court rejected the similar requirement imposed by the Court of Appeals for the District of Columbia that an employer must successfully prove the union's minority status through the election process before the minority prehire agreement became unenforceable.

The Board, in opposing this requirement, noted that the court of appeals actually agreed that minority agreements were unenforceable, it only disagreed as to *when* they became unenforceable. The Board argued that the formula utilized by the District of Columbia Circuit was "contrary to the Act's *fundamental principle* that employees shall have the right to 'bargain collectively through representatives of their own choosing.' " Petition for Certiorari, pp. 18-19, *Higdon*, 434 U.S. 335 (1978).

The Board also argued that the court of appeals' position was contrary to this Court's admonition in *Connell Construction Co., supra*, 421 U.S. at 632 that the 1959 amendments to the Act were designed to limit "top-down" organizing practices. Furthermore, the Board argued that "the Act places the burden on the union to establish its majority" and the court of appeals' rule was inconsistent with this burden because it required the employer to trigger the unenforceability of minority agreements. Petition for Certiorari, p. 18, *Higdon*, 434 U.S. 335 (1978).

Finally, the Board noted that Congress, in enacting Section 8(f), rejected a proposal that would have permitted the

Board to certify a union signing a prehire agreement as the employees' bargaining representative without proof of majority support.[19] The Board argued that the rule of the District of Columbia Circuit would, in effect, afford the union the presumption of majority status that Congress specifically rejected. Petition for Certiorari, pp. 15 and 17, *Higdon*, 434 U.S. 335 (1978).

By reversing the court of appeals in *Higdon*, this Court effectively rejected the similar analysis of the court below. Once again, the court below has focused on the conduct of the employer by requiring an affirmative act to trigger the unenforceability of minority prehire agreements.

Again, the court of appeals does not disagree that minority prehire agreements are unenforceable, it only disagrees as to *when* they are unenforceable.

Again, this principle conflicts with the *fundamental right* of employees to select their own representative; is inconsistent with the statutory scheme requiring the union to establish its majority status; and, in effect, affords the union the presumption of majority status that Congress specifically rejected.

Again, this principle conflicts with this Court's admonition in *Connell, Higdon* and *Woelke & Romero Framing, Inc. v. N.L.R.B.*, 102 S.Ct. 2071 (May 24, 1982), that Congress in enacting the 1959 amendments to the Act intended to limit "top-down" organizing. Three times this Court has examined the "top-down" organizing effect of Section 8(f) and each time this Court has strictly curbed such effect by limiting the scope of prehire agreements.[20]

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[19]Brief for Petitioner, p. 24, *Higdon*, 434 U.S. 335 (1978).

[20]As the District Court for the Northern District of Illinois stated in *Carpenters Pension Fund v. Sorensen*, 108 LRRM 2988 at 2991 (1981):

> "If this court enforced this agreement, there would be no reason why a union would need to obtain majority support."

Legislative History.

The Board, this Court, and almost every court that has passed on this issue cite the same legislative history to support conflicting conclusions. As this Court noted in *Higdon*, there were two aspects peculiar to the construction industry which led Congress to sanction prehire agreements:

> One reason for this practice is that it is necessary for the employer to know his labor costs before making the estimate upon which his bid will be based. A second reason is that the employer must be able to have available a supply of skilled craftsmen ready for quick referral. *Higdon*, 434 U.S. at 348, citing H.R. Rep. No. 741, I Leg. Hist. 777.

The court below and other courts which have enforced minority prehire agreements have noted these benefits and have concluded that it would be unjust to allow employers to gain these benefits and not comply with the agreements.[21]

However, the employers involved in these cases rarely, if ever, receive such benefits. The cases in which minority prehire agreements have been enforced are usually cases where employers have obtained their own work force and have paid wages different than those specified in the agreement. Their bids on the various jobs were related to wage rates actually given, not to those in the ignored prehire agreements. The case in issue as well as the cases of *Trust Fund v. McDowell*, 103 LRRM 2219 (W.D. Wash. 1979),

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[21]Once again, the Board has rejected this very proposition and has been upheld by this Court. The Administrative Law Judge in *R.J. Smith* had concluded that the employer had concealed its intentions to not honor the agreement and thus had sought to gain its benefits but not its burdens. Even if true, which is doubtful, the Board viewed the matter from the standpoint of employee fundamental rights. the Board reasoned that the election proviso constituted "a statutory safeguard against just the sort of irresponsibly imposed minority union which [the] record reveal[ed]". *R.J. Smith*, 191 NLRB at 694.

rvs'd, No. 80-3024 (9th Cir. Mar. 2, 1982), *petition for cert. filed* (U.S. May 28, 1982) (No. 81-2209); *Paddock v. Clark*, 107 LRRM 2325 (D. Ore. 1980), *rvs'd*, No. 80-3380 (9th Cir., Mar. 2, 1982), *petition for cert. filed* (U.S. Apr. 19, 1982); and *Welfare Fund v. Overhead Door Co.*, 681 F.2d 1 (D.C. Cir. 1982), are indicative. In the later three cases, the court below and the District of Columbia Circuit overruled district courts which had denied enforcement of minority prehire agreements. Although the court below and the District of Columbia Circuit have noted the benefits that prehire agreements can bring to employers as envisioned by Congress, they fail to mention that these employers received no such benefits.

When employers do obtain union referred workmen pursuant to prehire agreements, the union involved normally obtains majority status. This was envisioned by Congress in enacting Section 8(f)[22] and this Court acknowledged that such is the normal occurrence:

> "Neither has the Board challenged the voluntary observance of otherwise valid 8(f) contracts, which is the normal course of events." *Higdon*, 434 U.S. at 349.

When the union obtains its majority status through the employer's voluntary observance of the agreement, the Board will enforce the agreement in unfair labor practice proceedings. Thus, the interpretation of Section 8(f) adopted

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[22]The Report of the Senate Committee on Labor and Public Welfare stated:

> A second reason [for 8(f)] is that the employer must be able to have available a supply of skilled craftsmen ready for quick referral. A substantial majority of the skilled employees in this industry constitute a pool of such help centered about their appropriate craft union. If the employer relies upon this pool of skilled craftsmen, members of the union, there is no doubt under these circumstances that the union will in fact represent a majority of the employees eventually hired. S.Rep. No. 187 on S. 1555, 86th Cong., 1st Sess. 28 (1959), 1 Leg. Hist. 424.

by this Court is more harmonious with legislative history than is the interpretation adopted by the court below.

Furthermore, the court below looks to only a part of the legislative history in reaching its decision. The Board in *R.J. Smith*, quoted and emphasized additional legislative history to support its conclusion that Congress intended to authorize prehire agreements only as preliminary steps and that the election proviso evidenced Congressional intent to inquire into the union's majority status *at any time*.

Finally, this Court rejected the argument of the court below:

> Privileging unions and employers to execute and observe prehire agreements in an effort to acccommodate the special circumstances in the construction industry may have greatly convenienced unions and employers, but in no sense can it be portrayed as an expression of the employees' organizational wishes. *Higdon*, 434 U.S. at 349.[23]

D. The Court Below Did Not Apply This Court's Rationale in *Higdon*.

Preliminary Step.

The decision of the court below assumes that the prehire agreement is something that it is not — something more than a preliminary step.

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[23]The U.S. District Court for the Northern District of Illinois, in the case of *Carpenters Pension Fund v. Sorensen*, 108 LRRM 2988 (1981), gave an excellent point by point critique of the faulty analysis used by courts which enforce minority prehire agreements. The court, at p. 2991, stated:

> Finally, the Eighth Circuit reasoned that a prehire agreement benefits employees as well as employers in that it allows construction bidders to know their labor costs in advance of their bids and ensures industrial peace. Since the employer benefits from the agreement, he should also honor his obligations under it. But the fact that a prehire agreement is a valuable tool is not in dispute. Merely because such agreements are advantageous is no reason to extend the effect of a prehire agreement beyond its original purpose. A prehire agreement is merely a preliminary step that contemplates further action for the development of a full bargaining relationship.

The Board has stated more than once that a prehire agreement is *only* a preliminary step which envisions further acts before it becomes a binding collective bargaining agreement.

Once again, this Court, citing the Board's *Ruttmann* decision, adopted this position:

> As viewed by the Board, a "prehire agreement is merely a preliminary step that contemplates further action for the development of a full bargaining relationship"
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> * * *
>
> When the union successfully seeks majority support, the prehire agreement attains the status of a collective-bargaining agreement. . . . *Higdon*, 434 U.S. at 345, 350.

The court below was troubled with the concept that a minority prehire agreement may be void *ab initio*. It is not void *ab initio*. It is a real and viable preliminary step which may be voluntarily honored, and which, but for Section 8(f), would be violative of the law.

The court below, by requiring an employer to give notice of repudiation of a minority prehire agreement, is requiring an employer to repudiate a preliminary step. Furthermore, by enforcing the terms of the prehire agreement before such a notice of repudiation, the court below is enforcing something which has not yet "attained the status of a collective bargaining agreement." The court below is assuming the ultimate issue — whether or not the agreement is enforceable.

Conflict With Board.

Furthermore, this Court in *Higdon* specifically reviewed and adopted Board decisional authority which specifically rejected the analysis of the court below.

In *R.J. Smith*, the employer had totally ignored the prehire agreement from its execution. The employer concealed its intentions and noncompliance from the union. The union sought to recover *past* wages allegedly lost by the employees under the agreement. Such a claim would be honored by the court below since there was no active repudiation. The Board, however, held that the majority status of a union may be examined *at any time* in the litigation of refusal to bargain charges.

The Board held that a contrary result would be "anomalous" since the election proviso to Section 8(f) allowed such an inquiry at any time. This Court, in adopting this analysis, specifically noted the Board's decision in *R.J. Smith:*

> The proviso exposing unions with prehire agreements to inquiry into their majority standing by elections under §9(c) led the Board to its decision in *R.J. Smith:* an employer does not commit an unfair labor practice under §8(a)(5) when he refuses to honor the contract and bargain with the union and the union fails to establish in the unfair labor practice proceeding that it has ever had majority support. *Higdon*, 434 U.S. at 345.

The Board also refused to enforce a minority prehire agreement in *Ruttmann* even though the employer's noncompliance had again been concealed from the union.[24]

Finally, in *Higdon* itself, the Board specifically rejected the analysis of the court below. The Administrative Law Judge had distinguished *R.J. Smith* by noting that the employer did not actively repudiate the agreement but instead

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[24]The union business agent discovered the employer's noncompliance well after work had begun on the jobsite in dispute and asked why it had not been informed of the employer's presence on the project. *Ruttmann*, 191 NLRB at 706.

tried to abide by the agreement and ignore it at the same time.

In review, the Board specifically commented on and rejected the Judge's requirement of an active repudiation.

Unilateral Change.

The decision of the court below, requiring a notice of repudiation, is also inconsistent with the Board's holdings that employers may engage in unilateral changes of minority prehire agreements without violating Section 8(a)(5). The concept of "unilateral" change *assumes* that no notice was given to the union.

In *R.J. Smith*, the Administrative Law Judge,[25] the Board[26] and the court of appeals[27] all found that the employer's conduct was done without notice to the union. Nevertheless, the Board found the unilateral conduct to be privileged. In *Ruttmann* the Board again found that the employer's unilateral action was not violative of Section 8(a)(5). In *Higdon* the Board stated that where a union does not obtain majority status after obtaining a prehire agreement the employer does not violate Section 8(a)(5) "by *unilaterally* changing terms and conditions of employment set forth in the contract." *Higdon*, 216 NLRB at 46. (Emphasis added.)

This rule has been consistently followed by the Board. In *Dee Cee Floor Covering*,[28] 232 NLRB 421 at 422 (1977), the Board clarified the rule even further:

> Thus, where a union fails to prove that it has obtained majority status among the employer's employees, an

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[25] *R.J. Smith*, 191 NLRB at 697.

[26] *R.J. Smith*, 191 NLRB at 693.

[27] *Engineers Local 150 v. N.L.R.B.*, 480 F.2d 1186 at 1188 (1973).

[28] This case was presented to this Court in *Higdon*. It was specifically commented on by the Board in its Reply Brief at p. 8, n. 8.

> employer may withdraw recognition from that union *and/or make unilateral changes in the contractual working conditions* without thereby violating Section 8(a)(5) of the Act. (Emphasis added.)

The court below recognizes only half of this rule.

Jobsite-By-Jobsite.

This Court and the Board have repeatedly endorsed the concept that construction employers may ignore prehire agreements on "nonunion" jobs and honor them on "union" projects. These "union" and "nonunion" jobsites can, and do, exist at the same time. The "all or nothing" approach adopted by the court below does not allow for this jobsite-by-jobsite approach.

The rule of the court below was actually first advocated by the Administrative Law Judge in *Higdon* who condemned the employer's "blow hot, blow cold" utilization of the prehire agreement for union jobsites only, and considered it material that the employer had not terminated the contract "*in toto*". *Higdon*, 216 NLRB at 49-50.

The Board rejected the *in toto* repudiation argument and stated that the employer was privileged to honor the agreement on union jobsites but to ignore it on nonunion jobsites. The Board cited its earlier decision in *Irvin-McKelvy, supra*, and held that even if a union establishes its majority standing on individual projects, no presumption of majority standing flows to other projects. *Higdon*, 216 NLRB at 46.

This Court, in adopting the Board's position in *Higdon* specifically noted the *Irvin-McKelvy* case and adopted the proposition that the union must prove its majority status at each jobsite:

> The employer's duty to bargain and honor the contract is contingent on the union attaining majority support

at the various construction sites. *Higdon*, 434 U.S. at 345.

Recently, this Court in *Woelke & Romero, supra*, reaffirmed this position citing the Board's decision in *Giordano Construction Co.*, 256 NLRB No. 10 (1981):

> And the subcontractors themselves, if they do not have a stable workforce among whom the union has secured a majority, may be free to repudiate the [Section 8(f)] agreement at any project on which the union has not demonstrated that it represents a majority of their employees. *Woelke & Romero*, 102 S.Ct. at 2082.

The court below specifically rejected the jobsite-by-jobsite analysis adopted by this Court. In *Paddock v. Clark, supra*, the District Court for the District of Oregon dismissed a Section 301 suit against an employer who ignored the prehire agreement in performing a nonunion job after the union obtained majority status on one, and only one, prior jobsite. The district court specifically relied on this Court's *Higdon* decision and the Board case of *Dee Cee Floor Covering, Inc., supra*, which restated Board law that the union must establish its majority status on each project. The court below reversed the district court citing the decision now before this Court. The employer in *Paddock* was entitled to rely on Board law which had been endorsed by this Court. Only a reversal of the decision below will vindicate its reliance.

Voidable.

The court below, to support its position, reviewed this Court's *Higdon* decision and noted that this Court, in one instance, labeled prehire agreements "voidable." The court below then reasoned that the employer must actively repudiate such an agreement and further held that noncompliance with the agreement does not constitute sufficient notice of repudiation.

Initially, it is important to note that this Court was actually paraphrasing the position of the Board when it used the term "voidable."[29] The Board itself had used the term in its *Higdon* decision.[30] Yet in the very sentence that the Board used the term "voidable" it ruled that an employer may "ignore" a minority prehire agreement on "nonunion jobs" yet be free from the strictures of "an 8(a)(5) bargaining order." Thus, the Board not only rejected the requirement of a notice of repudiation in its *Higdon* decision, it did so in the very sentence that it used the word "voidable."

The isolation and distortion of the term "voidable" ignores the numerous statements by this Court that the enforceability of a prehire agreement is *contingent* on the union obtaining majority support among the employer's employees.

This Court embraced Board law which held that the duty "to honor the contract is contingent on the union attaining majority support" and that an employer does not violate Section 8(a)(5) when it "refuses to honor the contract" and the "union fails to establish in the unfair labor practice proceeding that it has ever had majority support." *Higdon*, 434 U.S. at 345. This Court also noted that the Board will not issue a Section 8(a)(5) bargaining order against an employer refusing to honor a prehire agreement "unless the union can demonstrate its majority status." *Id.* at 344. Finally, this Court noted that the Board emphasized that the union in *Higdon* had not achieved majority support and the prehire agreement therefore "had no binding force." *Id.* at 340.

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[29]"Under the Board's view . . . the prehire agreement is voidable . . . ." *Higdon*, 434 U.S. at 341.

[30]*Higdon*, 216 NLRB at 46.

Employee Detriment.

The courts which have enforced minority prehire agreements have mistakenly assumed that they were benefiting the employees. The fallacy of this argument was exposed by the U.S. District Court for the Northern District of Illinois in the case of *Carpenters Pension Fund v. Sorensen*, 108 LRRM 2988 at 2990 (1981):

> "This argument must be rejected for at least two reasons. First, it is not clear that payment of the pension is to the benefit of the employees. As an economic matter, these payments might erode wages which otherwise might be paid directly to defendant's employees. Second, and more importantly, it is not for the court to decide what the employees desire or what is for their benefit. Rather, it is for the employees to decide. If the majority of employees desire the union to take this action on their behalf, the union must show that it has majority support."

An obvious example of union action detrimental to employees in the enforcement of a minority agreement is found in *Local No. 1184 v. Moser Landscape, Inc.*, No. 81-3581 (C.D. Cal. Mar. 15, 1982), *appeal docketed*, No. 82-5388 (9th Cir. April 13, 1982). The union sued the employer to compel arbitration over the employer's refusal to use the union hiring hall on a project. An election was then held by the Board and the employees involved voted overwhelmingly against the union. Understandably so — the requirement for using the union hiring hall was obviously not in their best interests. Nevertheless, the district court, following *Todd v. McNeff*, felt compelled to enforce the prehire agreement until the date the union received notice of repudiation.

Furthermore, union trust funds are now loaning money to developers on construction projects who agree to perform

the project using only union signatory employers. Certainly a "nonunion" employee working for a "nonunion" employer could find it against his interests to have money paid "on his behalf" to such a trust fund. The use of the trust fund monies to exclude his employer from job opportunities is not to his benefit.[31]

In addition, union trust funds as well as unions benefit by top-down organizing. The use of union trust funds to support union construction is indicative. The point missed by the court below is that any enforcement of minority prehire agreements encourages unions to engage in, and to rely upon, top-down organizing.

In the final analysis, courts should not enforce or deny enforcement of prehire agreements on the basis of what they consider to be in the best interests of employees. The employees have this opportunity and no court should second-guess their judgment.

***Higdon* and Section 301.**

This Court, in *Higdon*, specifically dealt with the applicability of its holding to Section 301 suits. In rejecting the union's position that its holding was inconsistent with *Retail Clerks International Association v. Lion Dry Goods, Inc.*, 369 U.S. 17, this Court explained that its earlier ruling concerned the jurisdiction of federal courts to entertain suits on Section 8(f) contracts. This Court then stated:

> That a court has jurisdiction to consider a suit on a particular contract does not suggest that the contract is enforceable. It would not be inconsistent . . . for the court to hold that the union's majority standing is subject to litigation in a §301 suit to enforce a §8(f) con-

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[31]See, *AFL-CIO BCTD Pension Strategy*, 109 Lab. Rel. Rep. (BNA) 192 (Mar. 1, 1982); *Pension Fund Investment In Construction Industry*, 109 Lab. Rel. Rep. (BNA) 150 (Feb. 22, 1982).

> tract, *just as it is in a §8(a)(5) unfair labor practice proceeding*, and that absent a showing that the union is the majority's chosen instrument, the contract is unenforceable. *Higdon*, 434 U.S. at 351-52. (Emphasis added).

This statement was not mere *dicta*. This Court addressed an issue specifically briefed and argued by the parties. Not only is majority status litigable in Section 301 suits, it is litigable "just as it is in a §8(a)(5) unfair labor practice proceeding". The adoption of the "notice of repudiation" rule by the court below is in direct conflict with this Court's holding.

E. The Decision Below Renders the Election Process of the Act Meaningless.

This Court, in *Higdon*, noted that the proviso to Section 8(f) provides that prehire agreements shall not bar a petition for an election under the Act. This Court emphasized that the "employer and its employees — and the union for that matter — may call for a bargaining representative election at any time." *Higdon*, 434 U.S. at 345. This Court reasoned that this proviso evidenced the intent of Congress that prehire agreements were not meant to be imposed on employees despite their wishes. *Id.* at 349.

A call for an election is totally irrelevant in the Eighth and Tenth Circuits since these courts have held that minority agreements are enforceable in any event. *Contractors, etc. v. Associated Wrecking Co.*, 638 F.2d 1128 (8th Cir. 1981); *New Mexico Dist. Council, etc. v. Mayhew Co.*, 664 F.2d 215 (10th Cir. 1982). An election petition filed by an employer in the Ninth Circuit would only be relevant as evidence of repudiation. But the same would not be true of a petition filed by employees since it is the employer's repudiation which is crucial to the court below. And, in the

Ninth Circuit, an election would not be relevant for any point prior to repudiation even when the affected employees were eligible to vote in the election.[32]

These results stem from the fact that these courts of appeals do not focus their inquiry on the will of the employees. As such, the election process, which was an integral part of the Congressional scheme in enacting Section 8(f), does not fit into the analytic scheme fashioned by these courts of appeals.

These results also conflict with the decisions of this Court in *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261 (1964) and *South Prairie Construction Co. v. Local 627, Int'l. Union of Operating Engineers (Peter Kiewit)*, 425 U.S. 800 (1976).

In *Carey*, arbitration was sought pursuant to an enforceable collective bargaining agreement with a particular union. The nature of the grievance involved possible conflicts with employees represented by another union and the employer refused to arbitrate, contending that the Board had exclusive jurisdiction over such disputes. This Court noted that if the controversy were essentially a representational matter, the

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[32]Just such a result has occurred. The Board has often included past employees as well as present employees in elections in the construction industry. The Board often uses this special voter eligibility formula in the construction industry due to the fluctuation of the work force in the industry. *Daniel Construction Co.*, 133 NLRB 264 (1961).

The U.S. District Court for the Central District of California in the case of *Local No. 1184 v. Moser Landscape, Inc.*, No. 81-3581 (C.D. Cal. Mar. 15, 1982), *appeal docketed*, No. 82-5388 (9th Cir. Apr. 13, 1982), enforced the terms of a minority prehire agreement on a particular jobsite based on the Ninth Circuit's decision in this case. The employer sought an election after receiving the union's complaint. The Board conducted the election, using the *Daniel Construction Co.* formula, and included as eligible voters employees working on the past project. The union lost the election 25 to 1. The election results were irrelevant to the court which looked only to the date on which the union received a notice of repudiation.

employer could protect itself by invoking the procedures of the Board. *Carey*, 375 U.S. at 268. Since the employer had not yet invoked the procedures of the Board, this Court refused to halt arbitration based upon speculation that a final result might conflict with Board law. This Court did, however, state that if the Board reviewed and disagreed with the arbitrator's award, then, "the Board's ruling would, of course, take precedence; and if the employer's action had been in accord with that ruling, it would not be liable for damages under §301." *Id.* at 272. This Court also noted that the "*superior* authority of the Board may be invoked at any time." (Emphasis added) *Id.* at 272.

In South Prairie Construction Co. v. Local 627, Int'l. Union of Operating Engineers (Peter Kiewit), supra, this Court vacated the judgment of a court of appeals which, upon review of a Board order, had determined, in the first instance, a representation issue. The Board had not addressed the issue because it disposed of the case on other grounds. This Court held that the representation issue should have been determined initially by the Board. This Court noted that the Board's decisions on such matters, if not final, are, nevertheless, "rarely to be disturbed."

It is clear that the court below did not defer to the Board in its initial determination of the representation issue. The court below went even further, it rendered the Board's representation proceedings meaningless. McNeff, Inc. had invoked the "superior authority" of the Board by filing a petition for an election.[33] The final result of the Board's exercise of such authority is now meaningless because the majority status of the union is not relevant to the court below.

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[33]The court below should have deferred to the superior authority of the Board at the time the Board's authority was invoked.

Board Procedures.

In reaching its decision, the court below presented a misconception of the Board's election and unfair labor practice proceedings:

> The Board has expertise in determining the majority status of a union at any given time. It has no apparatus for determining a union's past status.

It is true that the Board's certification of election results reads for the present and the future. However, in the construction industry, past employees are often included with present employees as eligible voters in the election.[34] Furthermore, the Board often conducts representational hearings to determine if an election should be held. At issue in many of these hearings is whether the union had obtained a majority *in the past* among a stable complement of employees. If so, then the prehire agreement had attained the status of a collective bargaining agreement and would be a bar to an election under the Board's contract bar rules. These very facts and issues were litigated in the Board's representational case in *Giordano Construction Co.*, 256 NLRB No. 10, which was adopted by this Court in *Woelke & Romero, supra* at 4543.[35]

Furthermore, the court's position that the Board has no apparatus to determine a union's past majority status shows no understanding of Board unfair labor practice proceed-

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[34]There are situations where an election result will not reflect the majority status of a union at a certain time. This Court recognized in *Higdon* that representation elections "are not feasible" in a large segment of the construction industry. *Higdon*, 434 U.S. at 349. But this does not mean that election results should be ignored where they do reveal the majority status of the union at the time in question. It also does not mean that employee sentiment should be irrelevant. This is totally contrary to the cornerstone of this Court's decision.

[35]Pursuant to Section 101.20 of the Board's Rules and Regulations, Series 8, as amended, all parties have the right to present evidence in representational hearings.

ings. Because of the very nature of Section 8(a)(5) proceedings, the Board looks to *past* conduct by the employer and determines whether the union had majority status prior to or at the time of such past conduct. Congress gave the Board more than sufficient subpoena powers to conduct these inquiries.[36]

F. Only Voluntary Prehire Agreements Are Authorized by *Higdon*.

In its *Higdon* decision this Court repeatedly emphasized that Congress intended prehire agreements to be voluntary and that "no element of coercion" was permitted in obtaining such agreements. In reviewing legislative history, this Court noted Senator Kennedy's explanation to the Senate that the legislation was not intended to authorize coercion to obtain prehire agreements where the majority status of the union had not been established. *Higdon*, 434 U.S. at 348, n. 10, citing II *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959*, at 1715.

Despite this, the court below sanctioned the acquisition of minority prehire agreements by coercion by holding that such issues can only be raised at the time of repudiation.[37] No other court of appeals has adopted this ruling.

Thus, minority unions can obtain recognitional rights by coercion and, until repudiation, can effectively impose their will on the majority of the employees. This coercive rep-

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[36]29 U.S.C. Sec. 161.

[37]Although picketing was not involved in this case, the decision has been applied to enforce a minority prehire agreement obtained by picketing. *Local No. 1184 v. Moser Landscape, Inc.*, No. 81-3581 (C.D. Cal. Mar. 15, 1982), *appeal docketed*, No. 82-5388 (9th Cir. Apr. 13, 1982).

resentation can continue forever if the employer refuses to repudiate the agreement.

The Board has not specifically held that picketing to obtain a prehire agreement is itself unlawful. However, the Board has long recognized that prehire agreements should only be obtained by voluntary means. In *R.S. Noonan*, 142 NLRB 1132 (1963), the Board stated that the legislative history to Section 8(f) "unequivocally" shows that "a union cannot picket" for a prehire agreement. The Board found that the union violated Section 8(b)(7)(C) by picketing for over thirty days for a prehire agreement without the required representation petition having been filed. The Board ruled that this was true even though the employer had no employees which could vote in such a representation election.

Furthermore, even the dissent in the Board's *R.J. Smith* decision noted that legislative history requires that prehire agreements "must be entered into voluntarily by both parties." *R.J. Smith*, 191 NLRB at 696.

Whether or not the use of involuntary means to obtain a prehire agreement is itself a violation of the law is not controlling. Congress, this Court and the Board have stated that prehire agreements *must* be entered into voluntarily. If an affirmative defense cannot be raised on this issue, unions can ignore the will of Congress and the decisions of this Court and reap the benefits from their misconduct.

It is not logical that this defense cannot be raised until the employer notifies the union that it is repudiating the agreement. This allows the union to achieve compliance with the agreement through methods condemned by Congress and this Court.

This Court recently held in *Kaiser Steel Corporation v. Julius Mullins*, 70 L.Ed.2d 833, 102 S.Ct. 851 (January 13, 1982), that an employer may raise the illegality of a

contract as a defense to a breach of contract suit brought by trustees pursuant to Section 301 of the Act. This Court did not limit such a defense to a point in time at which the employer repudiated the agreement or any other artificial time.

Finally, it is important to note that the court below, the District of Columbia Circuit and the Eighth Circuit actually encourage the use of coercion to obtain prehire agreements. These courts note that prehire agreements benefit employers by providing them with labor peace. The obvious corollary is that if they had not entered into the prehire agreements, unions could legitimately use economic pressure to obtain the agreements despite the will of Congress.

THE DECISION BELOW FRAGMENTS NATIONAL LABOR POLICY BY ESTABLISHING CONFLICTING DUAL POLICIES ADMINISTERED BY TWO DIFFERENT TRIBUNALS.

The national labor policy enforced uniformly throughout the nation by the Board is that prehire agreements are not enforceable absent a showing of union majority status. The Board has made it clear that proof of majority status is a condition precedent to enforceability under Section 8(a)(5) of the Act. No affirmative repudiation by the employer is required to perfect the employer's defense.

This national labor policy is being eroded by the decision of the court below and by those of the Eighth, Tenth and District of Columbia Circuits. These courts have developed their own national labor policies by holding minority-union prehire agreements to be enforceable in Section 301 litigation. The Eighth and Tenth Circuits have held them to be enforceable at all times. The court below and the District of Columbia Circuit have held them enforceable until repudiation. The difference in these opinions is one of degree

only. They all conflict with the national labor policy embraced by this Court.

Unions and trust funds may now shop forums to obtain the more favorable national labor policy.[38] This case not only involved shopping between two forums, it involved the utilization of both forums. One forum, the Board, rejected the claim based on its interpretation of national labor policy. The other forum then upheld the same claim based on its own national labor policy. Such a result is totally adverse to this Court's repeated insistence upon a uniform national labor policy.

In *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), this Court admonished that federal common law regarding enforcement of collective bargaining agreements under Section 301 must be fashioned "from the policy of our national labor laws." *Id.* at 456. Furthermore, this Court has held that the subject matter of Section 301 is "peculiarly one that calls for uniform law." *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95 at 103 (1962). In *Howard Johnson Co. v. Detroit Joint Board*, 417 U.S. 249 (1974), this Court specifically rejected the proposition that basic federal labor policy formulated in unfair labor practice cases can be ignored in Section 301 litigation.

In *Howard Johnson* the union sought to compel a successor employer to arbitrate pursuant to a collective bargaining agreement with as predecessor employer. This Court

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[38]The substantive remedies for breach of contract under Section 301 are no greater than those remedies available through the Board under Section 8(a)(5). If an employer refuses to honor an enforceable collective bargaining agreement, the Board, under Section 8(a)(5), can order the employer to honor the agreement and make back-payments for lost fringe benefits as well as lost wages. In *Smith v. Evening News Ass'n.*, 371 U.S. 195 (1962) this Court held that the Board and the courts have concurrent jurisdiction to solve disputes when an unfair labor practice also constitutes a breach of contract.

had earlier held in an unfair labor practice context that a successor employer was not obligated to adhere to the terms of the predecessor's collective bargaining agreement. This Court rejected the union's claim that a contrary result should be permitted under Section 301 of the Act:

> It would be plainly inconsistent with this view to say that the basic policies found controlling in an unfair labor practice context may be disregarded by the courts in a suit under §301, and thus to permit the rights enjoyed by the new employer in a successorship context to depend upon the forum in which the Union presses its claims. *Howard Johnson*, 417 U.S. at 256.

This Court emphasized that the union's "effort to circumvent [this Court's prior decision] by asserting its claims in a § 301 suit to compel arbitration rather than in an unfair labor practice context cannot be permitted." *Id.* at 262.

National labor policy can now be ignored in four circuits, and, as this Court has stated, this cannot be permitted.

The Eighth Circuit in *Contractors, etc. v. Associated Wrecking Co.*, 638 F.2d 1128 (1981) held that different principles apply in Section 301 as opposed to unfair labor practice litigation:

> To say that an employer may challenge the majority status of a union in an unfair labor practice proceeding is not to say that the employer may assert the union's lack of majority status as a defense in a breach of contract action on a type of contract specifically authorized by the Act. *Associated Wrecking*, 638 F.2d at 1133.

The Tenth Circuit, in *New Mexico Dist. Council, etc. v. Mayhew Co.*, 664 F.2d 215, at 219 (1981), specifically adopted the Eighth Circuit's view on this issue. In adopting these conflicting standards for Section 301 and unfair labor

practice cases, neither court dealt with or distinguished this Court's decision in *Howard Johnson*.

The court below was not as blatant as the Eighth and Tenth Circuits in adopting separate labor policies for Section 301 litigation. The court below stated that it did not limit the *Higdon* decision solely to unfair labor practice charges. The court, nevertheless, adopted its own labor policy.

It noted that only "some language" in the Board decisions supported the proposition that unions must affirmatively demonstrate majority status before an enforceable collective bargaining agreement is formed. It alluded to the possibility that the Board's decision in *Higdon* was "written even more broadly" than was this Court's decision. Furthermore, in rejecting the concept that noncompliance could constitute repudiation, the court hypothesized that open and notorious noncompliance "can be so bald" as to constitute notice of repudiation, and cited the Board's decision in *Higdon* in support of this proposition.

The Board's decision in *Higdon* had absolutely nothing to do with "bald" compliance putting "the union on notice of the employer's intent to repudiate." The Board, in fact, took the opportunity to specifically reject any requirement of a notice of repudiation, actual or constructive. The court's half-hearted attempt to accommodate its policy with Board law is nonpersuasive.[39] It unilaterally and clearly formed its

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[39]Before rendering its decision herein, the Ninth Circuit reviewed a Board case involving a Section 8(f) agreement in *Precision Striping v. NLRB*, 642 F.2d 1144 (1981). The court noted that the case involved an unfair labor practice proceeding and that it "need not decide whether the union may be entitled to enforcement of the contract under Section 301(a) . . ."

The District of Columbia Circuit in *Overhead Door*, *supra*, also made an attempt to reconcile its decision with Board policy by noting one case in which the Board held that picketing to force past payment of benefits under a minority prehire agreement on one employee, did not

own national labor policy, which it dubbed the "middle ground."

It is respectfully submitted that this Court should adopt the decision of the Court of Appeals for the Fifth Circuit in *Baton Rouge Bldg. & Const. v. E.C. Schafer Construction*, 657 F.2d 806 (1981). This circuit correctly analyzed the issue as one of employee free choice. In rejecting the application of different policies for Section 301 litigation and unfair labor practice litigation, the court stated:

> But this distinction makes no difference. If the goal is the maintenance and insurance of *employee* free choice, it matters not whether the sword dangling above the employer's head is an unfair labor practice charge or a breach of contract suit. The direction of the pressures is the same — toward treatment of a nonmajority union as the employee's agent for collective bargaining. *E.C. Schafer*, 657 F.2d at 813.

UNION TRUST FUNDS CANNOT ENFORCE MINORITY PRE-HIRE AGREEMENTS PURSUANT TO THE MULTIEMPLOYER PENSION PLAN AMENDMENTS ACT OF 1980.

In 1980, Congress enacted the Multiemployer Pension Plan Amendments Act of 1980.[40] Section 306 of the Act provides:

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constitute recognitional picketing within the meaning of Section 8(b)(7)(C) when the union did not seek current recognition. The Board ruled that the prohibitions of 8(b)(7)(C) apply only to picketing for current recognition. *International Union of Operating Engineers, Local 150*, 255 NLRB No. 83 (1981). But the Board did not say that the union could have enforced its claim in an 8(a)(5) proceeding and it did not base its decision on a notice of repudiation rationale. It is difficult to believe that the Board overruled twelve years of consistent Board law in Section 8(a)(5) cases in this 8(b)(7)(C) case. A simple examination of the facts in *Overhead Door* refutes the District of Columbia Circuit's rationale. *Overhead Door* is the mirror image of *R.J. Smith*. The Board would not enforce either agreement. The District of Columbia Circuit enforced both using substantially the same rationale.

[40]Pub.L. No. 96-364, 94 Stat. 1208.

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or agreement. 29 U.S.C. § 1145.

The Court of Appeals for the District of Columbia Circuit alluded to this section in *Welfare Fund v. Overhead Door Co.*, 681 F.2d 1 (1982) and suggested that it may stand for the proposition that employers may be prohibited from alleging the unenforceability of prehire agreements in actions brought by union trust funds. The court noted statements by Congressman Thompson and Senator Williams expressing disapproval of the district court's original decision in *Overhead Door*, 488 F.Supp. 816 (1980). However, the court refused to rely on such a legislative interpretation, noting that the 1980 act "did not refer specifically to prehire agreements at all."

This Court rejected a similar interpretation of the 1980 amendments in *Kaiser Steel Corporation v. Julius Mullins*, 102 S.Ct. 851, 70 L.Ed.2d 833 (1982).

In *Mullins*, this Court held that the illegality of an agreement under Section 8(e) of the Act may be raised as an affirmative defense in Section 301 litigation. This Court noted that Congressional history of the section in issue reflected an intent to negate *unrelated* defenses and held that the illegality of an agreement was not an "unrelated" or "extraneous" defense. This Court did not attribute the views of the two Congressmen to Congress as a whole and further stated that the trust fund's argument necessarily assumed that Congress, in enacting the 1980 amendments, "implicitly repealed the antitrust laws, the labor laws, and any other statute which might be raised as a defense to a

provision in a collective bargaining agreement requiring an employer to contribute to a pension fund." This Court noted that such repeals by implication are disfavored and intent to repeal must be clear.

Similarly, Congress did not repeal Section 8(f), or any other section of "the labor laws" which supported this Court's decision in *Higdon*. Such intent to repeal must be clear.

Furthermore, the section by its own terms applies only to an employer who is "obligated to make contributions." The very issue in the enforceability of prehire agreements is whether the union has obtained majority status so that the agreement attains the status of a collective bargaining agreement. Until then, there is no "obligation". Furthermore, the status of the underlying agreement as an enforceable collective bargaining agreement is hardly an "unrelated" or "extraneous" defense.

Finally, the statute by its terms applies to a "collectively bargained" agreement. This concept assumes the adoption of the union as the agent of a majority of the employer's employees. This statute is consistent with the "fundamental principles" of the Act which protect employees in the selection of their bargaining agent. Once they adopt the agent, and "collectively bargain" for trust fund benefits, they are and consistently have been, protected by the federal labor laws.

CONCLUSION.

The court below did not make specific findings as to whether the Union had achieved majority status or whether the prehire agreement was voluntarily executed.

The case should be remanded to the court below to rule on these matters. The terms of the agreement should not be enforced if the Union did not enjoy majority status at the

relevant times. The terms of the agreement should not be enforced if it was not executed voluntarily.

Los Angeles, California.

Dated: August 30, 1982.

Respectfully submitted,

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